IN THE

Supreme Court of the United States

October Term, 1940

No. 270

CLARA C. BOLLES,

Petitioner,

vs.

THE TOLEDO TRUST COMPANY, EXECUTOR OF THE WILL OF GEORGE A. BOLLES, DECEASED,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF CASE

For the proper consideration of petitioner's petition for writ of *certiorari* it is necessary to set forth facts in addition to those stated by opposing counsel on pp. 2 to 5 of their brief. Some corrections in the statement of opposing counsel are also necessary.

The Constitution of Ohio, adopted in 1851, as amended, provides, Art. IV, Section 1 (Page's Ohio General Code Annotated, 1939, Vol. 11):

> "The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, *Courts of Probate,** * * *."

Section 8 provides:

> "The Probate Court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators, and guardians, * * * *and such other jurisdiction, in any county or counties, as may be provided by law.*"

The above excerpts show that the Constitution confers upon the Probate Courts just as great capacity to receive such jurisdiction as the legislature may be pleased to grant, as it confers upon the Courts of Common Pleas.

Prior to the adoption of the present Probate Code, which became effective on January 1, 1932 (Page's Ohio General Code Annotated, Vol. 7, Sections 10500 to 10512), there was no statute specifically conferring on Probate Courts equity powers. See Table of Parallel Sections, Page's Ohio General Code Annotated, Vol. 7, p. 105.

The New Probate Code, effective January 1, 1932, in §10501-53, provided as follows:

> "Sec. 10501-53. *Jurisdiction of the probate court.* Except as hereinafter provided, the probate court shall have jurisdiction:
>
> * * * * *
>
> 3. To direct and control the conduct, and settle the accounts of executors and administrators, and order the distribution of estates;
>
> * * * * *
>
> 13. To direct and control the conduct of fiduciaries and settle their accounts."

*Italics appearing in this and other quotations are supplied for emphasis.

The section then provides that

> "Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law."

And finally, that there may be no possible ground for questioning the jurisdiction, the section adds the paragraph:

> "The probate court shall have plenary power *at law and in equity* fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

The New Probate Code, Section 10509-41, further requires every executor or administrator to make and return on oath into court

> "* * * a true inventory of the real estate of the deceased located in Ohio, and of the goods, chattels, moneys, rights and credits of the deceased, *by law to be administered, and which have come to his possession or knowledge,* * * *."

Upon the filing of exceptions Section 10509-59 requires the Probate Court forthwith to set a day not later than one month after the day such inventory is filed, "for hearing the inventory," and provides the notice that must be given to the surviving spouse, next of kin, beneficiaries, etc. It goes on to provide:

> "* * * Exceptions to the inventory and/or year's allowance may be filed at any time prior to five days before the date set for hearing * * * *by any person interested in the estate or in any of the property included in the inventory.* * * * When exceptions are filed notice thereof and time of hearing thereon shall forthwith be given to the executor or administrator. * * * At the hearing the executor or administrator and any witness may be examined under oath. The court must enter its finding on the journal and tax the costs as may be equitable."

The case of *Bolles vs. Toledo Trust Co.* (1936), 132 O. S. 21, 4 N. E. (2d) 917, referred to by opposing counsel on p. 3 of their brief, originated upon exceptions to the inventory of the estate of George A. Bolles, deceased, filed by Mrs. Bolles under favor of the statute, on April 6, 1934. The exceptions were in the words and figures following, R. p. 412:

> "Said inventory and appraisement includes the following items of personal property *which should not be included as a part of said estate, for the reason that decedent had set aside the same for the benefit of said Clara C. Bolles,* his widow, by depositing the same in a safety deposit box to which she had access during his lifetime, and after the death of said George A. Bolles, said safety deposit box and contents were under the exclusive control of said Clara C. Bolles, to be used by her as her separate property, *and said contents were not intended to be included in the inventory and appraisement of said estate, to-wit*: (A list of the securities follows.)

She prayed, R. p. 414:

> "Wherefore said Clara C. Bolles prays that on hearing of said inventory and appraisement by said executor, *the above described stocks, bonds and notes be eliminated from said inventory and appraisement and be declared the property of said Clara C. Bolles and that said executor be ordered to return the same to said Clara C. Bolles.*"

The exceptions were overruled by the Probate Court, and Mrs. Bolles appealed to the Court of Common Pleas. Here she amended her exceptions, claiming, R. p. 361:

> "Said exceptor further says that each and all of the above described items of personal property are owned exclusively by her, that said personal property was given to her by said decedent, that

said property was accepted by said exceptor and retained by said exceptor in a safe deposit box rented in the name of Blevins Realty Company in The Ohio Savings Bank & Trust Company until December 21, 1931, and at all times subsequent thereto in a safe deposit box of Blevins Realty Company in The Toledo Trust Company, to which safe deposit boxes said exceptor was authorized to and did have access, and in which safe deposit boxes said items of personal property were segregated, set aside and retained, and considered by her and by said decedent as property belonging exclusively to said exceptor."

She prayed, R. p. 364:

"Wherefore, said exceptor, Clara C. Bolles, prays that the court order and direct The Toledo Trust Company, executor of the will of George A. Bolles, deceased, to exclude from the inventory of the assets of the estate of said decedent the property hereinbefore described, to return to her each and all the items of personal property hereinbefore described, and to do such things as are necessary to enable her to secure the transfer thereof upon the books and records of the respective corporations issuing said certificates and evidences of indebtedness, and for such other and further relief as the court deems just and equitable in the premises."

Mrs. Bolles' exceptions were sustained in the Court of Common Pleas and in the Court of Appeals.

The case finally reached the Supreme Court of Ohio, and that court reversed the judgment of the Court of Appeals and entered final judgment in favor of The Toledo Trust Company, as executor. See *Bolles vs. Toledo Trust Co., Executor* (1936), 132 O. S. 21, 4 N. E. (2d) 917.

The Supreme Court in its mandate, R. p. 473, said:

> "This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed and final judgment is hereby rendered in favor of the appellants."

The judgment of the Supreme Court of Ohio to which the present petition for writ of *certiorari* is directed, *Bolles vs. The Toledo Trust Co., Executor,* opinion of the Supreme Court of Ohio printed at 136 O. S. 517, was rendered in a suit instituted by Mrs. Bolles in the Court of Common Pleas of Lucas County, Ohio, on May 8, 1937, after the decision reported in 132 O. S. 21. In her petition in this suit Mrs. Bolles set forth two causes of action, both relating to the identical securities described in her former exceptions. In the first cause of action she set up an alleged oral declaration of trust by Mr. Bolles under which declaration Mr. Bolles was to hold the legal title to the securities until his death, at which time, she claims (R. p. 6):

> "* * * said trust, by the terms of his said declaration, was to and did terminate, and if plaintiff survived him, as she did, said property *was to and did become the sole property of this plaintiff* and was to be transferred to her as the beneficiary of said trust, * * *." (See R. p. 6.)

She further alleges (R. p. 7) that

> "* * * testator *intended that upon his death she should have the sole and exclusive legal and equitable title and ownership* to each and all of the items of personal property hereinbefore described, * * *"

and that she (R. p. 8)

> "* * * considered and believed that said property *would belong exclusively to her upon his (i.e., Mr. Bolles') death;* * * *."

In the second cause of action plaintiff repeated, by incorporation, the allegations of her first cause of action (see R. p. 8), and set forth matters as grounds for the declaration of a constructive trust.

The ultimate demand of the plaintiff in her petition (R. p. 13) was that the executor be ordered to

> "* * * transfer, turn over and deliver to the plaintiff each and all of the items of personal property and to do such other things as are necessary to enable the plaintiff to receive the benefits of said trust. * * *"

This demand, it will be noted, is identically the same as the demand which Mrs. Bolles made in her exceptions —compare demand in the present suit, R. pp. 13 and 14, with the demand in the original exceptions filed in the former suit, R. p. 414, and the demand in the amended exceptions in that suit, R. p. 364.

In the answer, besides other matters, The Toledo Trust Company, executor, set forth the proceedings and judgment and order of the Supreme Court in the former case (R. p. 29) and claimed that by reason thereof plaintiff was estopped from asserting the claim set forth in her first cause of action herein; that said judgment of the

Probate Court of Lucas County, Ohio, and the judgment, findings and opinion of the Supreme Court of Ohio were a bar to the first cause of action, and that all the matters set forth in said first cause of action had been fully adjudicated and determined in the proceedings hereinbefore described and set forth.

The same matter was interposed to the second cause of action (R. p. 35).

In her reply Mrs. Bolles pleaded again that the property, namely, the securities,

> "* * * became the property of and was owned by this plaintiff upon and after the death of said George A. Bolles * * *." (R. p. 36.)

She reiterated her claim:

> "* * * that said George A. Bolles intended and stated that the plaintiff should and would become the absolute owner (*i.e.*, of the securities) upon his death * * *." (R. p. 45.)

She admitted the allegations of the answer setting forth the pleadings and judgment in the former case, and pleaded further (R. p. 41):

> "Plaintiff alleges the decree of the Supreme Court is an adjudication in her favor, or at least an estoppel by verdict or judgment against the defendant, to the effect that it was the intention of George A. Bolles that the plaintiff should benefit by and have said property at his death, * * *."

The present case was tried almost entirely upon the evidence in the former case as read from the printed transcript of the evidence in that case. In fact, the Court of Appeals, in its opinion in the present case, said:

> "The record in the instant case consists of the printed copy of the transcript of the evidence used in the Supreme Court in the former case, together with additional evidence offered on behalf of the plaintiff in Common Pleas Court in the present case. This additional evidence is by some half dozen witnesses who had testified in the former case, and their testimony here is largely an amplification of their former testimony with reference to statements made by George A. Bolles that he was 'salting' or 'planting' or 'placing' the securities in the safety box at the bank for his wife."

It will be seen from the foregoing that the former proceeding and the present suit are identical in the following particulars:

(1) The parties are the same;

(2) The securities claimed are the same;

(3) The claim of property in the securities is the same, namely, the present complete legal and equitable title to all the securities;

(4) The relief demanded is the same, namely, the endorsement and surrender of possession of the securities and of all proceeds and dividends therefrom;

(5) The record is the same, except as to the amplification of their testimony by certain witnesses.

On the trial counsel for defendant, The Toledo Trust Company, executor, offered in evidence, from the bill of exceptions taken in the first case, the exceptions and amended exceptions to the inventory filed in the first case and the opinion of the Supreme Court and its judgment in that case (R. pp. 294 to 296), stating distinctly that these were offered on the plea of *res judicata* and estoppel contained in the answer (R. p. 295).

To this offer the only objection interposed by opposing counsel was this (R. p. 295):

> "By Mr. Welles:
> "We object to the offering of the portions of the bill of exceptions. *We have no objections to it all being offered.*"

Counsel for defendant executor proceeded (R. p. 296):

> "And then I (*i.e.*, counsel for The Toledo Trust Company, executor) offer the opinion of the Supreme Court as published in Volume 132 in this same case, and I also offer the order of the Supreme Court as appears on page 7 of our answer.
> By Mr. Welles:
> That is admitted by the pleadings.
> By Mr. Ohlinger:
> It is admitted by the pleadings, but I am offering the admission.
> By Mr. Watkins (counsel for Mrs. Bolles):
> Are you marking the Supreme Court opinion as an exhibit?
> By Mr. Ohlinger:
> I suppose it should be marked as an exhibit. It is marked as Exhibit O, and we will supply a typewritten copy of that, and the order of the Supreme Court will be marked Exhibit P—a typewritten copy of the order as appears in the answer."

Exhibit O, the opinion of the Supreme Court in the former case, reported at 132 O. S. 21, 4 N. E. (2d) 917, is not in the printed record, the printing of the opinion having been omitted by stipulation, R. p. 350. The order appears in the answer, R. p. 29.

No motion was made to strike out the allegations of defendant's answer to the effect that the judgment in the former case was *res judicata;* no objection was made to

the introduction of the judgment and opinion of the Supreme Court in evidence.

Nowhere throughout the entire record is there a motion, objection or exception calling attention to any federal right—in fact, the term "federal right" appears nowhere in the record.

Not until after the Supreme Court had decided the present case did opposing counsel suggest the existence of any federal question, and then it was only upon their application for rehearing.

ARGUMENT

(1) Petitioner Made No Attempt to Raise Any Federal Question in the Court of Common Pleas, Which Was the Trial Court, or in the Court of Appeals, or in the Supreme Court of Ohio.

Jurisdiction is the primary concern of this court upon every appeal. When a party seeks a review on the ground that a federal right has been denied, this court looks first of all to the record to determine whether the alleged federal right was properly claimed in the state court. No federal right was claimed in this case.

As we have shown, the answer of respondent, The Toledo Trust Company, executor, put the petitioner on notice at the very outset that it insisted upon the judgment in the first proceeding as *res judicata* and as an estoppel against the assertion of her claims in the present suit. Evidence was offered by respondent in support of the defense and was received without objection.

If, as opposing counsel now contend, the effect of

holding that the judgment in the previous action was *res judicata* as to the present suit is to deny to petitioner any opportunity for a hearing upon the merits of her cause of action in violation of her rights under the Fourteenth Amendment, then the defense was no defense at all, and its inclusion in the answer and the receiving of evidence in support of it were both improper.

The challenge to petitioner's alleged federal right came *in limine*, and it was for her to meet it then and there, and not to wait until after the Supreme Court of Ohio had sustained the defense before claiming it for the first time upon her application for rehearing.

It was open to respondent, under the Ohio Code of Civil Procedure, to attack the defense of *res judicata* as denying petitioner any opportunity for a hearing on the merits of her cause of action in violation of her rights under the Fourteenth Amendment, in the following ways:

(a) Under General Code, §11316, by a motion to require defendant to separately state and number the defense of *res judicata*:

> Eureka Fire & Marine Insurance Co. vs. Baldwin (1900), 62 O. S. 368, at p. 384, 57 N. E. 57;
>
> Denison University vs. Manning (1901), 65 O. S. 138, at p. 152, 61 N. E. 706.

Then under General Code, §11323, respondent could have demurred to the defense, raising by such demurrer the very point that petitioner now seeks to raise under the Fourteenth Amendment.

(b) The same claim of federal right could also have been raised under General Code §11370 by motion to

strike out the allegations in regard to the former proceeding, such a motion having the effect of raising the question of the sufficiency of the defense.

Miller et al. vs. Hixson (1901), 64 O. S. 39, at p. 56, 59 N. E. 749.

(c) The same claim of federal right could also have been made by objection to the evidence offered in support of the plea of *res judicata*, R. pp. 294 to 296.

The Supreme Court of Ohio will not hear and determine questions not presented and determined by the trial court. In *Stephenson vs. State of Ohio* (1928), 119 O. S. 349, 164 N. E. 359, the court said, p. 355:

> "It is particularly stated by counsel for plaintiff in error that they desire a review of the principles decided by this court in the case of *Tari vs. State*, 117 Ohio St. 481, 159 N. E. 594, and, more particularly, because this court in that case did not hold that the statutes under which the mayor's court exercised jurisdiction are unconstitutional. This court did so hold in the *Tari* case, and at the same time declared that the Supreme Court of the United States in the *Tumey* case had not held those statutes to be unconstitutional. It is not necessary in the instant case to make any declarations upon that point, because such questions were not argued in the lower courts, except in the oral argument before the Court of Appeals, for the first time, and such questions were not even suggested in the Court of Common Pleas or in the mayor's court. *We are not bound to declare either way upon questions which have not been decided by the courts of first instance.* We are not without abundant authority upon this proposition. *First Nat. Bank of Cape Girardeau vs. Foster* (Mo. App.), 271 S. W. 536; *Peverill vs. Board of Supervisors of Black Hawk Co.*, 201

Iowa 1050, 205 N. W. 543; *Ogilvie vs. Hailey,* 141 Tenn. 392, 210 S. W. 645; *Haun vs. State, ex rel. Bd. of Commrs. of Carroll Co.,* 183 Ind. 153, 108 N. E. 519; *Crowley vs. State,* 11 Or. 512, 6 P. 70; *Thrift vs. Laird,* 125 Md. 55, 93 A. 449; *Northumberland County vs. Zimmerman,* 75 Pa. 26, 32.

"All of the foregoing cases were decided by state courts. The Supreme Court of the United States has, however, declared the same principle in unmistakable language. In *Brooks vs. Missouri, supra,* Chief Justice Waite wrote the opinion. From the syllabus we quote:

> "'Applying to this case the rules stated in *Spies vs. Illinois,* 123 U. S. 131 (8 S. Ct. 22, 31 L. Ed. 80), that "to give this court jurisdiction under Section 709 Rev. Stat. (Title 28, Section 344, U. S. Code) because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, *it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way;*" that "to be reviewable here the decision must be against the right so set up or claimed;" and that "*as the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court,*" it appears that at the trial of the plaintiff in error, no title, right, privilege or immunity under the Constitution, laws or treaties of the United States were specially set up or claimed in the trial court.'
>
> "*Inasmuch as the invalidity of statutes was not brought in question in either the mayor's court or Court of Common Pleas, this court is not called upon under the authorities above quoted to again review the arguments set forth in the case of Tari vs. State, supra, asserting their constitutionality.*"

In the present case no federal question was ever decided by the Supreme Court of Ohio. The alleged federal claim was first advanced in the application for rehearing, but such an application, it is well settled, is addressed solely to the discretion of the court.

> "Rehearing in the court of review is not a matter of right but is a privilege which the court may grant in a proper case or may, in its discretion, *deny in any case* * * *. The reason that rehearings are not awarded as a matter of right in such courts is not any assumption of their infallibility, but the very practical one that there must at some time be an end of litigation not only for the benefit of the parties in each particular case but to enable others standing behind them to have their rights determined." 2 Ohio Jurisprudence 606, §565.

As stated in *Stephenson vs. State of Ohio, supra,* the Supreme Court of Ohio was "not bound to declare either way upon questions which have not been decided by the courts of first instance." No such question having been decided by the Court of Common Pleas in the present case, the Supreme Court was not obliged to pass upon it, even if it had been raised by opposing counsel in their argument upon the merits in the Supreme Court; still less was the Supreme Court called upon to decide it when it had not been raised in the Court of Common Pleas, or even in the Court of Appeals or before the Supreme Court, and when the first mention of the alleged federal claim came in the application for rehearing.

It is clear, therefore, that in the present case no federal right has been passed upon by the Supreme Court of Ohio.

This court is without jurisdiction to review the decision of a state court when no federal question has, as a matter of fact, been considered and determined.

Spies vs. Illinois (1887), 123 U. S. 131, at p. 181, 8 S. Ct. 22, 31 L. Ed. 80;

New York vs. Graves (1937), 300 U. S. 308, at p. 317, 57 S. Ct. 466, 81 L. Ed. 666.

(2) Petitioner's Attempt to Claim for the First Time in Her Application for Rehearing Her Alleged Right Under the Fourteenth Amendment Was Not Timely.

The next most important concern of this court upon a petition for writ of *certiorari* is the timeliness of the assertion of the alleged federal right.

Opposing counsel rely principally upon the decision in *Brinkerhoff-Faris Trust & Savings Co. vs. Hill* (1930), 281 U. S. 673, 50 S. Ct. 451, 74 L. Ed. 1107. In this case the company brought suit to enjoin a county treasurer from collecting or attempting to collect alleged discriminatory taxes assessed against shares of its capital stock, alleging that it had no adequate remedy at law or before the County Board of Equalization or before the State Board of Equalization. The trial court refused the injunction, and the Supreme Court of Missouri affirmed the trial court on the ground that plaintiff had an adequate remedy before another body, the State Tax Commission. In so deciding the State Supreme Court reversed its previous positive holdings in *Laclede Land & Improvement Co. vs. State Tax Commission*, 295 Mo. 298, and in other cases, which had become the established law, that there was *no* remedy before that commission.

This court stated the situation in these words, p. 677:

> "No one doubted the authority of the *Laclede* case until it was expressly overruled in the case at bar * * *. *The possibility of relief before the Tax Commission was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929.* Then it was too late for the plaintiff to avail itself of the newly found remedy."

The foregoing quotation from the opinion of this court sufficiently emphasizes the distinction between the *Brinkerhoff-Faris Trust & Savings Co.* case and the present case: there the possibility of relief before the State Tax Commission *"was not suggested by anyone in the entire litigation until the Supreme Court filed its opinion on June 29, 1929;"* in the present case the defense of *res judicata* was made by defendant in its first pleading in the trial court, evidence was offered in support of it on the trial and was received without objection, and this record was the basis of the decision of the Supreme Court of Ohio.

This court will not consider claims first made in an application for rehearing:

Godchaux Co. vs. Estopinal (1919), 251 U. S. 179, 40 S. Ct. 116, 64 L. Ed. 213;

Citizens National Bank vs. Durr (1921), 257 U. S. 99, 106, 42 S. Ct. 15, 66 L. Ed. 149;

Herndon vs. Georgia (1935), 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530;

Pennsylvania R. C. vs. Illinois Brick Co. (1936), 297 U. S. 447, 56 S. Ct. 556, 80 L. Ed. 796.

The present case is not one where the alleged federal claim arose from an unanticipated disposition of the case at the close of the proceedings in the State Supreme Court, but, on the contrary, it is one where

> "There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment."

See

American Surety Co. vs. Baldwin (1932), 287 U. S. 156, 163, 53 S. Ct. 98, 77 L. Ed. 231.

The present case presents very strikingly what this court in

Bridge Proprietors vs. Hoboken Co. (1864), 1 Wall. 116, 143, 17 L. Ed. 571,

and again in

Chicago, Indianapolis & Louisville R. Co. vs. McGuire (1905), 196 U. S. 128, 25 S. Ct. 200, 49 L. Ed. 413,

described as an

> "attempt to clutch at the jurisdiction of this court as an afterthought, when all other resources of litigation have been exhausted."

(3) Matters of State Procedure Do Not Raise a Federal Question.

Opposing counsel have cited many Ohio cases dealing with the jurisdiction of the Probate Court which were rendered *before* the New Probate Code took effect on January 1, 1932.

With the exception of the case of *Juhascz vs. Juhascz* (1938), 134 O. S. 257, 16 N. E. (2d) 328, opposing

counsel have cited *no* Supreme Court case and *no* lower court case on the jurisdiction of the Probate Court upon exceptions to an inventory under the new code. In the *Juhascz* case, the widow (1) filed an election as surviving widow in which she stated that she repudiated an antenuptial contract; and (2) excepted to the refusal of the appraisers to set off to her her year's allowance and statutory setoff, but said nothing about the antenuptial contract. The Supreme Court of Ohio merely held that the filing of the election and the filing of the exceptions did not constitute "an action to set aside" the antenuptial agreement, nor an attack upon it, within the contemplation of G. C. §10512-3. Syllabus 5, which states the law, reads:

> "5. Under Section 10512-3, General Code, an antenuptial agreement is deemed valid unless an action to set it aside is brought within six months after the appointment of the executor or administrator, or unless the validity of the agreement is otherwise attacked within that period, and neither the filing of a written election to take under the law, in which is incorporated a statement that the widow repudiates 'the prenuptial agreement, which was procured by fraud,' nor the filing of exceptions to the inventory and appraisement on the ground that the appraisers failed to allow the statutory setoff and a year's support to the widow, constitutes an attack within the purview of the statute."

This is all that the court decided, or that it was necessary to decide, in the case. Whatever other implications opposing counsel desire to draw from points which were not decided, or which were not necessary for a decision of the *Juhascz* case, the fact remains that the well-considered opinion of the Supreme Court in the

former case of *Bolles vs. Toledo Trust Co.* showed plainly that the court regarded the Probate Court as having jurisdiction, upon exceptions to the inventory, to determine the relevant questions of title to the securities. Nor may Mrs. Bolles, after having invoked the jurisdiction of the Probate Court, now question its exercise of that jurisdiction.

See the very emphatic statements of the Supreme Court of Ohio on this point, and against thus trifling with the courts in

State ex rel. vs. Roach (1930), 122 O. S. 117, 170 N. E. 866;

Hedland vs. Jones (1934), 128 O. S. 68, 190 N. E. 214.

See also

Chicot County Drainage District vs Baxter State Bank, decided by United States Supreme Court, January 2, 1940, 84 L. Ed. 277.

As we have already pointed out, the new code differs from all previous statutes in providing expressly in §10501-53 that

> "The probate court shall have plenary power *at law and in equity* fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited by statute."

This very provision was considered by the Supreme Court of Ohio in *Unger vs. Wolfe* (1938), 134 O. S. 69, 15 N. E. (2d) 955. Here a firm of attorneys brought action in the Court of Common Pleas to recover for services rendered a person who had been adjudged an incom-

petent and whose estate had been placed in the hands of a guardian appointed by the Probate Court. The attorneys insisted that in view of G. C. §11215 conferring on the Court of Common Pleas general original jurisdiction —the very section on which opposing counsel build their argument on p. 11, *et seq.*, of their brief—the action had been properly instituted in that court. The Supreme Court of Ohio referred to the provision which we have quoted and said, page 74:

> "The difficulty with this contention of the plaintiff is that Section 11215 is an old and general statute while Section 10501-53 is recent and special. Therefore under the canons of statutory construction the latter must take precedence over the former. *It is difficult to escape the effect of specific provisions that 'such jurisdiction shall be exclusive in the Probate Court unless otherwise provided by law' and that 'the Probate Court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute'.*" (Italics supplied.)

No proposition is more thoroughly established than that federal courts follow state decisions in the interpretation of state statutes:

> Keith vs. Johnson (1926), 271 U. S. 1, 46 S. Ct. 415, 70 L. Ed. 795;
>
> Sioux County vs. National Surety Co. (1928), 276 U. S. 238, 48 S. Ct. 239, 72 L. Ed. 547;
>
> Chicago, M., St. P. & P. R. Co. vs. Risty (1928), 276 U. S. 567, 48 S. Ct. 396, 72 L. Ed. 703;
>
> Erie R. Co. vs. Tompkins (1938), 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

In asking this court to review the present case opposing counsel are in reality asking this court to interpret an Ohio statute and to define the jurisdiction of a probate court upon exceptions to an inventory.

This is not within the jurisdiction of this court.

American Surety Co. vs. Baldwin (1932), 287 U. S. 156, 163, 53 S. Ct. 98, 77 L. Ed. 231.

(4) A Decision That a Matter Has Been Adjudicated in Another Proceeding Does Not Raise a Federal Question.

The Supreme Court of Ohio, in deciding that the former proceeding was *res judicata* as to the present action, cited a leading case decided by this court:

Northern Pacific R. Co. vs. Slaght (1907), 205 U. S. 122, 27 S. Ct. 442, 51 L. Ed. 738.

In that case it appeared that the predecessors in interest of the Northern Pacific R. Co. had brought suit against Slaght for the purpose of having him "declared a trustee, and as holding the land in trust" for said parties by virtue of a deed to them of said lands from one Powers—see opinion, p. 128. Judgment in this action went in favor of Slaght, and against the predecessors of the Northern Pacific Railway Co. Thereafter the Northern Pacific brought the principal action, an action in ejectment against Slaght—see opinion, p. 125—claiming title in its predecessors, and therefore in itself, by virtue of an Act of Congress and by reason of the statute of

limitations of the state. This court, on page 131, quoted with approval from Herman on Estoppel, §92, as follows:

> " 'Although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when a cause of action has resulted in favor of the defendant, *when the plaintiff claims the property of a certain thing there can be no other action maintained against the same party for the same property,* for that would be to renew the question already decided, for the single question in litigation was whether the property belonged to the plaintiff or not; and it is of no importance that the plaintiff failed to set up all his rights upon which his cause of action could have been maintained; it is sufficient that it might have been litigated.' " (Italics supplied.)

In the former proceeding Mrs. Bolles claimed the entire legal and beneficial ownership of the securities on the ground of an alleged trust and gift *inter vivos;* in the present case she claimed the same thing on the ground of an alleged oral declaration of an express trust or on the ground of a constructive trust by reason of the alleged intent of Mr. Bolles to give her the securities and his alleged belief that he had carried out that intention. The *claim,* in the language of this court in the *Slaght* case was the same in both cases—the entire present legal and equitable title to the securities.

If the securities were subject to the alleged trusts, then they were not properly a part of the testator's estate —Mr. Bolles held them as trustee. He was in the same position as the testator, one Nehemiah Scott, in the case of *Quinby vs. Walker* (1863), 14 O. S. 193. Here the beneficiaries of the securities which Nehemiah Scott had held as trustee during his lifetime brought suit against

his executor, James G. Scott, upon the latter's administration bond to recover the proceeds which James G. Scott had collected on these securities, The situation presented two questions which the Supreme Court states in its opinion (p. 198): (1) "Did, then the bonds which are claimed to have been collected by James G. Scott, as executor, belong, in any substantial sense to his testator, at the time of his death?" (2) "Were they goods, chattels, or credits of the testator, which it became the duty of his executor to administer?" The Supreme Court answered these two questions, pp. 198, 199:

> "* * * We think they are shown not to have been assets of the estate. The testator was, in respect to them, a mere trustee, who had faithfully fulfilled his trust up to the time of his death. The whole beneficial interest in them was in the heirs of William Moore, and their assignees; and neither creditors, heirs nor legatees of the testator could assert a claim to them or their proceeds.
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> * * * * *
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> "* * * Having collected the bonds, James G. Scott is, no doubt, liable to account to the plaintiff for his share of the proceeds; but we think it equally clear, that as the trust funds so collected were not assets of the estate of his testator, his default as trustee, is not chargeable to his sureties in the administration bond."

Nor was the case of *Quinby vs. Walker* overruled by the decision in *Dayton vs. Bartlett*, 38 O. S. 357 (1882), as claimed by opposing counsel, brief p. 31. The latter case dealt with an entirely different subject—tenancy in common in partnership assets—and did not even refer to *Quinby vs. Walker*. As late as 1930, the Supreme Court cited and recognized the authority of *Quinby vs. Walker*.

See

The United States Fidelity & Guaranty Co. vs. Decker, Adm'r. (1930), 122 O. S. 285, 287, 171 N. E. 333.

The exceptions distinctly raised the question: Were the securities claimed by Mrs. Bolles, in the words of General Code of Ohio, §10509-41, "goods * * * of the deceased by law to be administered?"

They were not such "goods * * * of the deceased by law to be administered": (1) if Mr. Bolles had given them to Mrs. Bolles during his lifetime; or (2) if, as in *Quinby vs. Walker*, they were held by Mr. Bolles subject to the alleged trusts.

The judgment in the previous case decided that they *were* "goods * * * of the deceased by law to be administered," and that concluded all other claims to the property.

The Supreme Court of Ohio therefore correctly applied the principles of *res judicata* as laid down by this court in the *Slaght* case.

But even granting that the Supreme Court of Ohio did not correctly apply the principles, still such an error does not raise a federal question and this court has no jurisdiction to review the decision of the Supreme Court of Ohio. An *erroneous* decision does not deprive a party of his property without due process of law within the terms of the Fourteenth Amendment:

Central Land Co. vs. Laidley (1895), 159 U. S. 103, 16 S. Ct. 80, 40 L. Ed. 91.

And the same is true of an erroneous decision that a previous judgment is *res judicata*:

> Chicago Life Ins. Co. vs. Cherry (1917), 244 U. S. 25, 28 to 30, 37 S. Ct. 492, 61 L. Ed. 966;
>
> Baldwin vs. Iowa State Traveling Men's Ass'n. (1931), 283 U. S. 522, 524, 51 S. Ct. 517, 75 L. Ed. 1244.

It is to be noted that in this case petitioner, in her reply, expressly invoked the judgment of the Supreme Court of Ohio in the previous proceeding as an *adjudication in her favor*. She said in her reply, R. p. 41:

> "Plaintiff alleges the decree of the Supreme Court is an adjudication in her favor, or at least an estoppel by verdict or judgment against the defendant, to the effect that it was the intention of George A. Bolles that the plaintiff should benefit by and have said property at his death, * * *."

The Supreme Court of Ohio having been called upon by both parties to interpret and apply its decree, did interpret and apply it in the case before it.

Its interpretation and application of its decree did not raise a federal question.

(5) Opposing Counsel's Misapprehension as to the Appropriate Procedure Under the New Probate Code, If There Was Such Misapprehension, Does Not Furnish a Basis for the Claim That Due Process of Law Has Been Denied.

We do not wish to be understood as suggesting that opposing counsel misapprehended the appropriate procedure under the New Probate Code. On the contrary, in the exceptions filed in the first proceeding Mrs. Bolles

distinctly pleaded everything that she now claims. She said, R. p. 412:

> "Said inventory and appraisement includes the following items of personal property *which should not be included as a part of said estate, for the reason that decedent had set aside the same for the benefit of said Clara C. Bolles, his widow,* by depositing the same in a safety deposit box to which she had access during his lifetime and after the death of said George A. Bolles said safety deposit box and contents were under the exclusive control of said Clara C. Bolles, to be used by her as her separate property, *and said contents were not intended to be included in the inventory and appraisement of said estate, to-wit:*"

She prayed, R. p. 414:

> "Wherefore said Clara C. Bolles prays that on hearing of said inventory and appraisement returned by said executor, the above described stocks, bonds and notes be eliminated from said inventory and appraisement and be declared the property of said Clara C. Bolles and that said executor be ordered to return the same to said Clara C. Bolles."

These exceptions raised the issue of the right of property in the securities, whether on the ground of a gift *inter vivos*, or on the ground of a trust by virtue of which the entire legal and equitable title devolved on Mrs. Bolles upon her husband's death.

Opposing counsel's argument on pp. 11 to 22 to the effect that the previous proceeding was a special proceeding, and the present suit is one in equity, is pointless because petitioner *did choose* the special proceeding, and having submitted her claims to adjudication in that proceeding, she cannot now seek to avail herself of a suit

in equity. As said by this court in *Stoll vs. Gottlieb* (1938), 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104:

> "* * * It is just as important that there should be a place to end as that there should be a place to begin litigation * * *."

But even if counsel misapprehended the appropriate procedure, as they infer on pp. 44 to 46 of their brief, such misapprehension furnishes no ground for the jurisdiction of this court. The same argument was made in *American Surety Co. vs. Baldwin* (1932), 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231. This court said in answer to this argument, p. 168:

> "The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course, the time for appealing had elapsed. *The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error, does not furnish the basis for a claim that due process of law has been denied.* Compare *O'Neil vs. Northern Colorado Irrigation Co.*, 242 U. S. 20, 26."

CONCLUSION

For the reasons stated the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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